

# *Table of Contents*

## BACKGROUND

- What is arbitration?
- How is arbitration different from mediation?
- How is arbitration different from expert determination?
- How is arbitration different from litigation?
- What are the main advantages of arbitration?
- Why is arbitration commonly provided for in contracts involving mainland Chinese parties?
- What are the potential disadvantages of arbitration?
- What is "institutional" arbitration?
- What is "ad hoc" arbitration?
- What are the advantages of institutional arbitration?
- What are the advantages of ad hoc arbitration?
- Is arbitration cheaper than litigation?
- Is arbitration quicker than litigation?
- Do arbitrators' decisions create binding legal precedent?
- Are arbitral awards subject to appeal?

## ARBITRATION IN HONG KONG

- Why arbitrate in Hong Kong?
- What is the role of the Hong Kong International Arbitration Centre?
- Does the HKIAC have its own arbitration rules?
- Does the HKIAC administer arbitration proceedings?
- Must arbitrations conducted in Hong Kong be administered by the HKIAC?
- Must arbitrations conducted in Hong Kong be held at the HKIAC?
- Must arbitrations in Hong Kong be conducted under the HKIAC's arbitration rules?
- Must the parties retain Hong Kong legal counsel in a Hong Kong arbitration?
- Where can I find more information on arbitration in Hong Kong?

## PROCEDURAL LAWS AND RULES

- What rules govern arbitration proceedings in Hong Kong?
- What arbitration rules will be applied if none have been agreed to by the parties?
- What are "international" and "domestic" arbitrations?
- What are the key differences between international and domestic arbitrations?
- What is the UNCITRAL Model Law?
- What are the UNCITRAL Arbitration Rules?

## THE ARBITRATION AGREEMENT

- Is it necessary to have an arbitration agreement?
- What effect does an arbitration agreement have?
- Can an arbitration agreement cover claims in tort, as well as contract?
- What happens if a party attempts to litigate a dispute which is covered by an arbitration agreement?
- What are the requirements of a valid arbitration agreement?
- What matters should be dealt with in an arbitration agreement?
- Is it necessary to use a prescribed form of arbitration agreement?
- Should an arbitration agreement provide for one or three arbitrators?
- What language should be chosen to conduct the arbitration proceedings?
- What happens if the parties agree to conduct the arbitration in two languages?
- What happens if a contract containing an arbitration clause is found to be invalid?
- What is the significance of the place of the arbitration?
- Can hearings be held outside the place of the arbitration?

## THE GOVERNING LAW OF THE DISPUTE

- If a contract provides for arbitration in Hong Kong, must it also be governed by Hong Kong law?

- Does the tribunal apply Hong Kong law or the governing law of the contract?
- What if the contract does not state its governing law?
- How is the governing law determined for tort claims?

## COMMENCING AN ARBITRATION

- How is an arbitration commenced?
- What is the time limit for commencing arbitration?

## APPOINTING A TRIBUNAL

- How is the number of arbitrators determined?
- What if the parties do not agree on the number of arbitrators?
- How are the arbitrators appointed?
- Who can be appointed as arbitrator?
- Are the arbitrators required to be independent of the parties?
- Can either party challenge the appointment of an arbitrator?
- What is the time limit for challenging an arbitrator?

## ARBITRATION PROCEDURE

- What are the general duties of an arbitrator?
- What happens after the tribunal has been appointed?
- What happens if the respondent challenges the tribunal's jurisdiction?
- Can the tribunal's ruling on jurisdiction be appealed?
- What ancillary powers does an arbitrator have?
- In what circumstances can the tribunal order the claimant to give security for costs?

- What powers can a court exercise in support of an arbitration?
- How do the parties formally set out their cases?
- What pleadings are exchanged?
- What happens if a respondent fails to serve a defence?
- Are the parties entitled to inspect each others' documents?
- What discovery is ordered?
- Do the rules of privilege apply in arbitration?
- What is legal advice privilege?
- What is litigation privilege?
- What is "without prejudice" privilege?
- Do the rules of evidence apply in arbitration proceedings?
- Can the tribunal investigate the facts on its own initiative?
- Are witnesses cross-examined?
- Are expert witnesses used in arbitration?
- Is an oral hearing always held?
- In what order do the parties present their cases?
- What case management techniques may the tribunal employ?
- What is the purpose of splitting a hearing between liability and quantum phases?
- Can an arbitrator in a dispute also act as mediator?

## THE AWARD

- What remedies may an arbitral tribunal grant?
- What is the time limit for making an award?
- Does the tribunal have the power to award interest?
- What powers does the tribunal have with respect to costs?

- What is included in the costs of the arbitration?
- How is the amount of costs payable determined?

## ENFORCING AND CHALLENGING AWARDS

- How is an arbitration award enforced?
- What if the claim settles before an award is made?
- How may an international arbitration award made in Hong Kong be challenged?
- Can the parties to a domestic arbitration exclude the right to appeal?
- How may a domestic arbitration award made in Hong Kong be challenged?
- What is the New York Convention?
- Does the New York Convention apply to Hong Kong?
- How are New York Convention awards enforced in Hong Kong?
- In what circumstances can leave to enforce a New York Convention award be refused?
- Are arbitral awards made in Mainland China enforceable under the New York Convention?
- How are mainland awards enforced in Hong Kong?
- How are awards made in non-New York Convention jurisdictions enforced in Hong Kong?
- How are awards made in Hong Kong enforced overseas?

# *Background*

## **1. What is arbitration?**

Arbitration is a consensual dispute resolution process where the parties agree to submit their disputes to be resolved by an arbitral tribunal, which award will be final and binding.

## **2. How is arbitration different from mediation?**

A mediator's role is to attempt to bring the parties to a mutually accepted settlement. A party is not required to accept terms of settlement proposed in a mediation. A mediation settlement takes effect as an agreement, rather than as an immediately enforceable award.

## **3. How is arbitration different from expert determination?**

Expert determination is commonly used to resolve disputes on a narrow technical issue (such as the value of a company or an asset). As in arbitration, the expert's finding is usually binding on the parties. An arbitrator's brief is broader: it is to resolve commercial disputes in accordance with law and commercial practice.

#### **4. How is arbitration different from litigation?**

Arbitration proceedings are conducted in private, rather than in court, and are heard by an arbitrator rather than a judge. Arbitration procedure is generally less formal, and there are no restrictions on who may represent parties in an arbitration.

#### **5. What are the main advantages of arbitration?**

Parties from different countries can choose to appoint a panel of neutral arbitrators, who may be experts in the relevant area, and to hold the arbitration in a neutral venue. Arbitration is conducted in private and is generally confidential. Arbitration procedure is flexible, which can lead to disputes being resolved more quickly and cheaply than in the courts. Arbitration awards can be enforced internationally more easily than court judgments.

#### **6. Why is arbitration commonly provided for in contracts involving mainland Chinese parties?**

Arbitration is particularly appropriate for international disputes involving mainland Chinese parties, as the mainland courts generally will not recognise or enforce foreign or Hong Kong court judgments. It is commonly used in domestic disputes in Mainland China, and is therefore relatively familiar to Chinese parties.

## 7. **What are the potential disadvantages of arbitration?**

As arbitration is based on the consent of the parties, arbitrators generally have no power to make orders affecting non-parties to the arbitration agreement. In contrast to courts, they generally do not have power to compel witnesses to testify or produce documents, to require third parties to participate in arbitration proceedings, or to make awards requiring a third party to do (or to refrain from doing) something.

## 8. **What is "institutional" arbitration?**

Institutional arbitration proceedings are administered by an arbitration institute, such as the International Chamber of Commerce ("ICC"), the China International Economic and Trade Arbitration Commission ("CIETAC") or the London Court of International Arbitration ("LCIA"). Typically, these are conducted under the arbitration rules devised by each institution.

## 9. **What is "ad hoc" arbitration?**

Ad hoc arbitrations are arranged solely between the arbitrators and the parties. They may adopt a ready-made set of arbitration rules (such as the UNCITRAL Rules of Arbitration) or, less frequently, may be conducted under rules drawn up by the parties.

## **10. What are the advantages of institutional arbitration?**

Institutional arbitration has the benefit of ensuring that the proceedings are administered in an orderly and regular manner. Arbitration institutes may also exercise a degree of "quality control" over arbitrators and their awards. Adopting an established set of arbitration rules has the obvious benefit of avoiding arbitrators constantly having to "reinvent the wheel" in applying appropriate procedures.

## **11. What are the advantages of ad hoc arbitration?**

Ad hoc arbitration may be cheaper insofar as no administration fees are payable to an arbitration institute. In principle, it may also provide the parties with flexibility to devise rules and procedures appropriate to their disputes. In practice, however, devising and agreeing to a set of ad hoc procedures will require substantial specialist input and detailed negotiation between the parties.

## **12. Is arbitration cheaper than litigation?**

The cost of arbitrating can depend greatly on the fees charged by the arbitration institute used (if any), how many arbitrators are appointed, and the fees charged by the arbitrators. Because of its flexibility and informality, arbitration can be conducted more cheaply than court proceedings. If the parties adopt a strongly adversarial approach, however, arbitration proceedings can be as expensive as litigation.

### **13. Is arbitration quicker than litigation?**

Again, because of its procedural flexibility, it is generally possible to conduct arbitration proceedings more quickly than litigation. Restrictions on the parties' rights to appeal arbitration awards can shorten a dispute by months or years. Unlike courts, however, arbitrators generally do not have power to issue default or summary judgment in simple cases where there is no real issue to be determined, and are generally required to hold a hearing of the claim.

### **14. Do arbitrators' decisions create binding legal precedent?**

As arbitration proceedings are private and confidential, the parties are generally prohibited from disclosing the outcome of an arbitration, except in limited circumstances. As a result, arbitration may not be ideal where a party hopes to set a precedent in one case that it can use against other parties in future.

### **15. Are arbitral awards subject to appeal?**

Arbitration awards are usually final and not subject to review on the merits. In Hong Kong, awards made in domestic arbitrations may be appealed in limited circumstances on the grounds that an arbitrator has made an error of law or has committed misconduct. Awards made in international arbitrations conducted in Hong Kong are not subject to appeal.

# *Arbitration in Hong Kong*

## **16. Why arbitrate in Hong Kong?**

Hong Kong is conveniently located on the doorstep to Mainland China and is easily accessible from all East Asia's major commercial centres. It has a strong, arbitration-friendly legal system, and a large pool of arbitrators, lawyers and other professionals. Arbitral awards made in Hong Kong are readily enforceable in all East Asian jurisdictions, including Mainland China.

## **17. What is the role of the Hong Kong International Arbitration Centre?**

The HKIAC is an independent body established to promote the use of arbitration in Hong Kong. It provides facilities and support services for arbitrations conducted in Hong Kong. Under the Arbitration Ordinance, the HKIAC is authorised to appoint arbitrators (and to determine the number of arbitrators) where the parties to a dispute are unable to agree.

## **18. Does the HKIAC have its own arbitration rules?**

Parties to arbitrations heard at or administered by the HKIAC are free to choose the procedural rules for their arbitrations. The HKIAC has formulated several sets of rules for domestic arbitrations, "short form" proceedings, small claims, documents only proceedings and electronic transaction disputes, which the parties are free to adopt. In September 2008, the HKIAC issued the HKIAC Administered Arbitration Rules. These provide for a "light touch" administered arbitration modeled on the Swiss Rules and may be used in either domestic or international arbitrations.

## **19. Does the HKIAC administer arbitration proceedings?**

The HKIAC administers arbitration proceedings when requested to do so by the parties. In this role, it acts as a conduit for communications between the parties and the arbitrators and provides other administrative support as appropriate. Arbitrations may be held at the HKIAC even if administered by another arbitration institute, or if they are not institutionally administered.

## **20. Must arbitrations conducted in Hong Kong be administered by the HKIAC?**

No. The parties may choose to have their arbitration administered by any other arbitration institute, or they may choose not to have their dispute administered by an institute.

**21. Must arbitrations conducted in Hong Kong be held at the HKIAC?**

No. Hearings may be held at any place convenient to the parties and the arbitrators.

**22. Must arbitrations in Hong Kong be conducted under the HKIAC's arbitration rules?**

No. The parties are free to select any set of arbitration rules.

**23. Must the parties retain Hong Kong legal counsel in a Hong Kong arbitration?**

No. The parties are free to appoint locally-qualified or foreign legal advisors or non-legal representatives to represent them in an arbitration.

**24. Where can I find more information on arbitration in Hong Kong?**

The HKIAC website, [www.hkiac.org](http://www.hkiac.org), contains information relating to the HKIAC's role and administrative services, the arbitration rules adopted or recommended by the HKIAC, its model arbitration agreements and the HKIAC's panel of arbitrators.

# *Procedural Laws and Rules*

## **25. What rules govern arbitration proceedings in Hong Kong?**

Arbitrations conducted in Hong Kong are governed by the Arbitration Ordinance, which provides the basic legal framework. The detailed arbitration procedure is governed by the arbitration rules chosen by the parties (usually in their arbitration agreement). Where the Arbitration Ordinance and the chosen arbitration rules are silent, the arbitrator has a discretion to adopt appropriate procedures to ensure fair and efficient conduct of the arbitration.

## **26. What arbitration rules will be applied if none have been agreed to by the parties?**

For international arbitrations conducted at the HKIAC, the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules will typically be applied. For domestic arbitrations conducted at the HKIAC, the HKIAC Domestic Arbitration Rules will normally be used. If no rules have been agreed upon, the Arbitration Ordinance provides a procedural framework for the parties and the arbitrator to devise appropriate procedures for their dispute.

## **27. What are "international" and "domestic" arbitrations?**

The Arbitration Ordinance provides for a dual-track arbitration system. Arbitrations conducted in Hong Kong are governed by different procedures, depending on whether they are "international" or "domestic". International arbitrations are those where one or more parties has its place of business outside Hong Kong, or where the dispute is most closely connected with a jurisdiction outside Hong Kong. If neither of these conditions is satisfied, the arbitration is domestic. In addition, the parties may agree that an arbitration shall be treated as "international" or "domestic".

## **28. What are the key differences between international and domestic arbitrations?**

In domestic arbitration, the court has greater powers to supervise or assist the arbitration process. A domestic arbitration award may be subject to appeal in court (on a point of law only), whereas an international arbitration award is not.

## **29. What is the UNCITRAL Model Law?**

The Model Law was promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in 1985, to provide states with a template for an effective and comprehensive arbitration regime with limited scope for local courts to intervene in the arbitral process. It has been adopted (or adapted) in numerous jurisdictions around the world. In 1990, Hong Kong adopted the Model Law to apply to international arbitrations. The Model Law is reproduced at Schedule 5 to the Arbitration Ordinance.

## **30. What are the UNCITRAL Arbitration Rules?**

The UNCITRAL Arbitration Rules were adopted by UNCITRAL in 1976, to provide a set of procedural rules appropriate for use in international commercial arbitrations generally.

# *The Arbitration Agreement*

## **31. Is it necessary to have an arbitration agreement?**

Yes. As arbitration is a consensual process, an arbitrator has no power to determine a dispute unless the parties have agreed to this and the requirements of the arbitration agreement have been complied with. The parties may agree to arbitrate before a dispute arises (most commonly by an arbitration clause in a contract), or after a dispute has arisen.

## **32. What effect does an arbitration agreement have?**

An arbitration agreement provides the basis for an arbitrator's jurisdiction. An arbitrator will not entertain a request for arbitration in the absence of an arbitration agreement. The parties may also modify or supplement the applicable arbitration rules by express provision in the arbitration agreement.

**33. Can an arbitration agreement cover claims in tort, as well as contract?**

Yes. An arbitration agreement is usually drafted to include claims arising "out of or in connection with" a particular contract. This wording is broad enough to cover tort claims (such as misrepresentation) that relate to the parties' transaction, and generally enables related tort and contract claims to be determined together by the arbitral tribunal.

**34. What happens if a party attempts to litigate a dispute which is covered by an arbitration agreement?**

If a party commences court proceedings in a dispute which is covered by an arbitration agreement, the court should stay its proceedings and decline to hear the dispute.

**35. What are the requirements of a valid arbitration agreement?**

An arbitration agreement is an agreement by the parties to submit to arbitration disputes which have arisen or which may arise between them. It must be made in writing or evidenced in writing. It is not strictly necessary that the arbitration agreement be signed by the parties, although this is of course the conventional manner for the parties to formally indicate their consent.

**36. What matters should be dealt with in an arbitration agreement?**

The most important matters are the place of arbitration, the applicable arbitration rules, the number of arbitrators and how they are to be appointed, and the language in which the proceedings will be conducted.

**37. Is it necessary to use a prescribed form of arbitration agreement?**

No. Like other arbitration institutes, the HKIAC has a number of recommended clauses for use in various situations. These recommended clauses can be relied on to confer effective jurisdiction on the arbitral tribunal. The recommended forms should not be departed from substantially without obtaining specialist advice.

**38. Should an arbitration agreement provide for one or three arbitrators?**

There are several factors to be considered. A three-arbitrator tribunal will result in higher arbitration costs and may make it difficult to schedule hearings at short notice. A three-arbitrator panel is more appropriate for complex or technical disputes, and in cases where the parties are from jurisdictions with different legal systems or commercial customs.

**39. What language should be chosen to conduct the arbitration proceedings?**

In principle, the parties are free to agree to conduct the arbitration in any language they choose. In practice, the parties should consider the languages spoken by the parties, the languages that the agreements and the evidence will likely be in, and the extent to which the choice of language may affect the choice of arbitrators.

**40. What happens if the parties agree to conduct the arbitration in two languages?**

Often, the parties to a contract agree to conduct their arbitration in two languages. This requires every document to be presented in both languages and oral submissions and evidence to be interpreted at the hearing. The requirement to produce (and agree upon) such translations can add significantly to the cost of the proceedings.

**41. What happens if a contract containing an arbitration clause is found to be invalid?**

If a contract containing an arbitration clause is found to be invalid, this does not invalidate arbitration proceedings commenced under the arbitration clause. An arbitration clause is considered to be a separate agreement from the larger contract in which it is contained.

**42. What is the significance of the place of the arbitration?**

The place (or the "seat") of the arbitration has two important legal consequences. First, it determines which jurisdiction's arbitration laws apply to the proceedings and which courts may exercise supportive and supervisory powers over the arbitration. Second, it determines the place of the arbitration award for international enforcement purposes.

**43. Can hearings be held outside the place of the arbitration?**

In international arbitrations conducted in Hong Kong, the tribunal may conduct hearings outside Hong Kong without affecting Hong Kong's status as the place of the arbitration.

# *The Governing Law of The Dispute*

## **44. If a contract provides for arbitration in Hong Kong, must it also be governed by Hong Kong law?**

No. The governing law of the contract need not follow the place of the arbitration.

## **45. Does the tribunal apply Hong Kong law or the governing law of the contract?**

The tribunal will apply the governing law of the contract to determine the substantive issues in a contract claim. (Procedural issues are, however, governed by the Arbitration Ordinance and the applicable arbitration rules.) If the contract is governed by a foreign law and the tribunal has no expertise in that legal system, the parties will be required to call expert evidence to establish the applicable principles of the foreign law.

#### **46. What if the contract does not state its governing law?**

If the contract is silent as to its governing law, the tribunal will be required to determine what its governing law is (typically as a preliminary issue). This will be the law of the jurisdiction with which the contract has the closest connection. If the contract provides for arbitration in Hong Kong, this may be a factor in favour of the tribunal applying Hong Kong law as the governing law of the contract.

#### **47. How is the governing law determined for tort claims?**

The tribunal will determine the governing law of a tort claim by applying Hong Kong choice of law rules. This may lead to tort claims being determined under a different law to the governing law of the contract.

# *Commencing an Arbitration*

## **48. How is an arbitration commenced?**

Broadly, an arbitration is commenced when the claimant serves the respondent with a notice requesting (or requiring) that the dispute be referred to arbitration. The formal requirements of such a notice will depend on whether the arbitration is international or domestic, as well as the requirements under the applicable procedural rules.

## **49. What is the time limit for commencing arbitration?**

The limitation period for a dispute to be submitted to arbitration is the same as for court proceedings, and is determined by the Limitation Ordinance. The limitation period may be varied by agreement between the parties.

# *Appointing a Tribunal*

## **50. How is the number of arbitrators determined?**

An arbitral tribunal will consist of either one or three arbitrators. The number of arbitrators is usually agreed in the arbitration clause, or may be agreed by the parties after a dispute has arisen.

## **51. What if the parties do not agree on the number of arbitrators?**

In a domestic arbitration, only one arbitrator will be appointed if the parties are unable to agree. In an international arbitration, the HKIAC will determine whether the arbitration should be heard by one or three arbitrators.

## **52. How are the arbitrators appointed?**

A single arbitrator is usually appointed by agreement, or by an independent third party. Where three arbitrators are used, it is customary for each party to appoint one arbitrator and for the chairman to be appointed either by agreement between the party-appointed arbitrators or by an independent third party. For arbitrations in Hong Kong, where the parties are unable to agree on the appointment of an arbitrator, either party may request the HKIAC to make the appointment.

**53. Who can be appointed as arbitrator?**

The parties may, in their arbitration agreement, provide certain criteria for arbitrators to be appointed (as to nationality, professional background etc). When the HKIAC is requested to make an appointment, it will appoint an arbitrator from its panel of arbitrators.

**54. Are the arbitrators required to be independent of the parties?**

Arbitrators are required to be independent, regardless of whether they are party-appointed or jointly appointed by both parties. An arbitrator or potential arbitrator must disclose any circumstances that may give rise to a reasonable doubt as to his or her neutrality or independence. An arbitrator should not communicate privately with any party regarding the substance of the dispute.

**55. Can either party challenge the appointment of an arbitrator?**

An arbitrator may be challenged if justifiable doubts exist as to the arbitrator's neutrality or independence, or if the arbitrator does not possess the requisite qualifications. If a challenge to an arbitrator is not upheld by the tribunal and the arbitrator does not step aside voluntarily, an application for his removal may be made in court.

## **56. What is the time limit for challenging an arbitrator?**

In international arbitrations, a party who intends to challenge an arbitrator must provide the tribunal with a written statement of the grounds of its challenge within 15 days after becoming aware of the constitution of the tribunal or becoming aware that grounds for challenge exist. No time limit is stated for challenging an arbitrator in a domestic arbitration on the ground of impartiality, although in principle any such challenge should be made promptly.

# *Arbitration Procedure*

## **57. What are the general duties of an arbitrator?**

An arbitrator is required (i) to facilitate the fair and speedy resolution of disputes without unnecessary expense, (ii) to act fairly and impartially between the parties, (iii) to give the parties a reasonable opportunity to present their cases and (iv) to adopt procedures appropriate to the circumstances of the particular case to avoid unnecessary delay and expense.

## **58. What happens after the tribunal has been appointed?**

The tribunal's first step in the arbitration will usually be to convene a preliminary meeting of the parties, to make directions and establish a timetable for the conduct of the arbitration and to consider any other preliminary matters.

**59. What happens if the respondent challenges the tribunal's jurisdiction?**

A respondent may raise a challenge to the tribunal's jurisdiction on the grounds that the arbitration agreement is invalid or does not cover the claim made in the arbitration. The challenge must be raised no later than the respondent files its statement of defence. The tribunal will then determine whether or not it has jurisdiction, usually as a preliminary issue in the arbitration.

**60. Can the tribunal's ruling on jurisdiction be appealed?**

If the tribunal determines that it has jurisdiction to hear a claim, any party may within 30 days of the ruling, appeal the decision to the Court of First Instance. No further appeal lies from the decision of the Court of First Instance. The arbitration may continue while the appeal is in progress.

**61. What ancillary powers does an arbitrator have?**

An arbitrator has wide-ranging powers to regulate the arbitration procedure before the full hearing. These include powers to order the claimant to pay security for costs, to order the respondent to provide security for money in dispute, to order discovery of documents, to grant interim injunctions and to direct the manner in which evidence is to be given.

## **62. In what circumstances can the tribunal order the claimant to give security for costs?**

The purpose of requiring a claimant to provide security for costs is to ensure that a defendant is not left out of pocket if the claimant is unsuccessful and is ordered to pay the respondent's costs. Security for costs may be appropriate if the respondent can show that the claimant's financial position is so weak that it may not be able to meet a costs order against it. Unlike in litigation, security for costs may not be ordered simply on the ground that the claimant is resident outside Hong Kong. Security for costs is awarded less commonly in arbitration than in litigation.

## **63. What powers can a court exercise in support of an arbitration?**

The courts have overlapping powers to make certain pre-hearing orders that may be made by an arbitrator. These include ordering that an amount in dispute be secured and granting interim injunctions. A court may, however, decline to make such an order if the application would be more appropriately dealt with by the arbitral tribunal. A court may also make an order requiring a person to give evidence before an arbitral tribunal or to produce documents.

## **64. How do the parties formally set out their cases?**

At the beginning of the arbitration process, the parties will set out their cases in writing, so that the issues in dispute can be identified. These written submissions are often referred to interchangeably as "pleadings" or "statements of case". Whatever term is used, these submissions are usually less rigidly formal than court pleadings. Further requirements and deadlines for the exchange of documents are usually provided in the arbitration rules.

## **65. What pleadings are exchanged?**

The claimant sets out its case in a statement of claim. The respondent then files a statement of defence to respond to the statement of claim and, if appropriate, a counterclaim if it seeks relief against the claimant. The claimant may then file a reply (to respond to matters raised in the defence) and a defence to the counterclaim. A party may also seek to clarify the matters in dispute by requesting the other party to clarify or provide particulars of matters set out in its pleadings.

## **66. What happens if a respondent fails to serve a defence?**

If the respondent fails to participate in the arbitration proceedings, the arbitrator is still required to hold a hearing (either orally or on the papers) to ensure that the claimant has proved its case. Unlike court proceedings, an arbitrator does not have power to enter a default judgment against a party who fails to plead its case.

## **67. Are the parties entitled to inspect each others' documents?**

The process by which the parties to a dispute are required to disclose and allow inspection of their documents relevant to the matters in dispute is known as discovery. Discovery is a standard step in arbitration procedure in Hong Kong.

## **68. What discovery is ordered?**

Unlike court proceedings, there is no automatic right to wide-ranging discovery. The arbitrator will usually order discovery, although it is not mandatory. The scope of discovery will either be agreed between the parties or determined by the arbitrator. If so ordered, the parties will be required to disclose all relevant documents regardless of whether they assist or harm their own case.

## **69. Do the rules of privilege apply in arbitration?**

Yes. The most important types of privilege are legal advice privilege, litigation privilege and "without prejudice" privilege. If a document is privileged, a party is not required to disclose it, even if it is relevant to the matters in dispute.

## **70. What is legal advice privilege?**

Legal professional privilege protects from disclosure communications between clients and their lawyers made for the purpose of giving or receiving legal advice. It may only be waived by the client.

**71. What is litigation privilege?**

Litigation privilege protects from disclosure documents prepared in preparation for, or in anticipation of, litigation proceedings. It applies equally to documents prepared in preparation for arbitration proceedings. Litigation privilege is broader than legal advice privilege insofar as it is not restricted to communications between a party and its lawyers. Litigation privilege may only be waived by the party for whom the document was produced.

**72. What is "without prejudice" privilege?**

"Without prejudice" privilege protects from disclosure communications made between the parties to a dispute (or their lawyers) in attempting to reach a settlement of the dispute. It applies whether or not the documents or discussions are formally stated to be without prejudice. "Without prejudice" privilege may only be waived on the agreement of both parties.

**73. Do the rules of evidence apply in arbitration proceedings?**

An arbitral tribunal is not bound by the strict rules of evidence that apply in court proceedings (except for the rules relating to privilege). The tribunal can decide what evidence to admit and then how that evidence should be weighed in reaching its findings of fact.

#### **74. Can the tribunal investigate the facts on its own initiative?**

A tribunal has power to act inquisitorially (on its own initiative) in ascertaining the facts. If it exercises this power, however, it is essential that the evidence it obtains should be disclosed to the parties to allow them an opportunity to make submissions on the evidence. If a tribunal fails to do, its award may be at risk of being set aside for failing to give the parties sufficient opportunity to present their cases.

#### **75. Are witnesses cross-examined?**

Written witness statements are exchanged in advance of the hearing. These usually stand as the witness's evidence in chief. At the hearing, witnesses are usually cross-examined by the other party's advocate, who will attempt to highlight any inconsistencies or other shortcoming in the witness's evidence. The advocate for the party calling the witness may be permitted to re-examine the witness briefly to clarify any matters raised in cross-examination.

#### **76. Are expert witnesses used in arbitration?**

Expert witnesses may be used in arbitration in much the same way as in litigation. It is possible (though still rare) for an arbitrator to appoint an independent expert in place of the parties' respective expert witnesses.

**77. Is an oral hearing always held?**

No. The parties may agree, or the arbitrator may decide, to determine the arbitration on the documents and written submissions provided by the parties, without convening an oral hearing. In an international arbitration, the tribunal must hold an oral hearing if requested by either party.

**78. In what order do the parties present their cases?**

There is no fixed sequence for the conduct of the hearing. The tribunal is only bound by the over-riding requirement to allow each party to present its case. However, it is conventional for the claimant to open its case and call its witnesses followed by the respondent. Closing submissions are often presented in writing.

**79. What case management techniques may the tribunal employ?**

The tribunal may expedite the hearing by holding separate hearings for discrete issues, including preliminary issues such as jurisdiction or splitting the hearing into liability and quantum phases. It may order that submissions or witness evidence be given in writing, rather than orally, or it may impose strict time limits upon the parties' oral submissions. Finally, the tribunal may impose a cap on the parties' recoverable costs in the arbitration, thereby providing a deterrent against the parties incurring excessive costs.

## **80. What is the purpose of splitting a hearing between liability and quantum phases?**

The liability phase of an arbitration determines whether the respondent is liable to the claimant (typically, whether the respondent has breached the contract). The quantum phase is the assessment of the quantum of damages to be awarded against the respondent. In complex commercial disputes, the assessment of damages often requires the parties to lead detailed expert accounting evidence. By determining the question of liability before proceeding to consider the question of damages, the tribunal seeks to avoid the cost to the parties of obtaining such expert evidence in the event that the respondent is found not to be liable.

## **81. Can an arbitrator in a dispute also act as mediator?**

An arbitration agreement may provide for a mediator to be appointed to attempt to reach a settlement, failing which he may act as arbitrator. Alternatively, the parties may agree in writing after an arbitration has been commenced that the arbitrator may act as mediator. In each case, the mediator may later act as arbitrator, though he is required to disclose any confidential information that he may have obtained from either party.

# *The Award*

## **82. What remedies may an arbitral tribunal grant?**

A tribunal has power to grant any remedy that may be granted by the Hong Kong courts, except to make any order that is binding on non-parties to the arbitration.

## **83. What is the time limit for making an award?**

There is no specified time limit. An arbitrator who fails to issue his award in a timely manner may be removed by the court.

## **84. Does the tribunal have the power to award interest?**

The tribunal has power to award simple or compound interest on the principal sum at such rate as it considers appropriate up to the date of the award. Once made, simple interest accrues on the award at the same rates as are payable on Hong Kong court judgments.

## **85. What powers does the tribunal have with respect to costs?**

The tribunal has power to direct which party is liable to pay the costs of the arbitration and on what basis. The usual order is that the losing party is required to pay the winning party's costs.

## **86. What is included in the costs of the arbitration?**

The costs of the arbitration include the costs incurred by the parties in the course of the arbitration (such as professional fees), the arbitrators' fees, fees paid to the arbitration institution and other costs of the hearing.

## **87. How is the amount of costs payable determined?**

Once an award to costs has been made, the parties may agree the sum to be paid to the party in whose favour the award was made. If no agreement is reached, the party whose costs are to be paid may submit its bill of costs to court for "taxation". In the taxation process, the party's costs are assessed by a court official, and any costs that were not properly or reasonably incurred will be disallowed.

# *Enforcing and Challenging Awards*

## **88. How is an arbitration award enforced?**

An arbitral award made in Hong Kong may be enforced in the same manner as a court judgment, once the court has given leave to enforce the award. The application for leave to enforce is made on paper without notice to the party against whom the enforcement is sought.

## **89. What if the claim settles before an award is made?**

Where the parties to an arbitration enter into a settlement agreement, the agreement may be enforced with permission of the court, in the same manner as an award.

## **90. How may an international arbitration award made in Hong Kong be challenged?**

There is no right of appeal from an international arbitration award (except from the tribunal's finding that it has jurisdiction). An award may, however, be set aside on grounds relating to lack of jurisdiction, improper constitution of the tribunal or serious procedural irregularity.

**91. Can the parties to a domestic arbitration exclude the right to appeal?**

Yes, although the exclusion may only be made by written agreement made after the commencement of the arbitration.

**92. How may a domestic arbitration award made in Hong Kong be challenged?**

A domestic arbitration award may be appealed to the Court of First Instance on a question of law, either with the consent of the parties or if the question may substantially affect the rights of any party. No appeal lies on questions of fact, however. The award may be set aside if the arbitrator has committed misconduct (including failure to act impartially or serious procedural irregularity).

**93. What is the New York Convention?**

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958, provides the foundation for cross-border enforcement of arbitral awards. There are over 130 parties to the Convention, each of whom undertakes to recognise and enforce in their local courts arbitral awards made in other member states.

**94. Does the New York Convention apply to Hong Kong?**

Yes. The New York Convention was first applied to Hong Kong in 1977 by the government of the United Kingdom. Upon Hong Kong's return to Chinese sovereignty, the central government affirmed that the Convention would continue to apply to Hong Kong.

**95. How are New York Convention awards enforced in Hong Kong?**

Awards made in Convention states are enforced in the same manner as awards made in Hong Kong. They may be executed in the same manner as court judgments upon leave of the court.

**96. In what circumstances can leave to enforce a New York Convention award be refused?**

Enforcement of a Convention award may be refused only on narrow grounds relating to lack of jurisdiction, improper constitution of the tribunal, serious procedural irregularity or if enforcement of the award would be contrary to public policy. Enforcement may not be refused merely because of an error of fact or law.

**97. Are arbitral awards made in Mainland China enforceable under the New York Convention?**

China is a party to the New York Convention. However, the Convention only applies to the enforcement of awards made in a different state. Following Hong Kong's return to Chinese sovereignty, this requirement was no longer satisfied.

**98. How are mainland awards enforced in Hong Kong?**

In 1999, the central and Hong Kong governments enacted laws to permit reciprocal enforcement of arbitral awards, on conditions similar to those provided in the New York Convention. Only arbitral awards made by recognised mainland arbitral institutions may be enforced in Hong Kong under these provisions, however.

**99. How are awards made in non-New York Convention jurisdictions enforced in Hong Kong?**

Non-Convention awards may be enforced in Hong Kong with leave of the court under section 2GG(2) of the Arbitration Ordinance.

## **100. How are awards made in Hong Kong enforced overseas?**

Awards made in Hong Kong are enforceable in principle in the courts of all states that are party to the New York Convention. In Mainland China, Hong Kong awards are enforceable in accordance with the arrangement on reciprocal enforcement of arbitration awards. In other states, Hong Kong awards may be enforceable, depending on local law.